

Before the  
**FEDERAL COMMUNICATIONS COMMISSION**  
 Washington, DC 20554

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MAR 26 2004

Federal Communication Commission  
Bureau / Office

In the Matter of )

Amendment of Section 73.202(b),  
Table of Allotments, )

FM Broadcast Stations. )

(Newcastle and Pine Haven, Wyoming) )

MB Docket No. 03-258

RM-10833

RM-10864

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MAR 30 2004

Federal Communications Commission  
Office of the SecretaryTO: Chief, Audio Division  
Media Bureau

**OPPOSITION TO**  
**COUNTERPROPOSAL OF TRACY BROADCASTING CORPORATION**

New Generation Broadcasting, LLC ("New Generation"), licensee of KQRQ(FM), Channel 222C1, Rapid City, South Dakota, by its attorneys, hereby opposes the Counterproposal of Tracy Broadcasting Corporation ("Tracy") filed in response to the *Notice of Proposed Rule Making* (the "*NPRM*") released by the Commission in the above-referenced proceeding.

Tracy is the licensee of KMOR(FM), Channel 225C, Scottsbluff, Nebraska, and KOZY-FM, Channel 239C3, Gering, Nebraska. In its Counterproposal, Tracy asks the Commission to downgrade KMOR from Channel 225C to Channel 225C2 and relocate the station approximately 122 kilometers southwest from one state to another state by changing the station's city of license from Scottsbluff, Nebraska to the Francis E. Warren Air Force Base ("Warren AFB"), a Federal governmental facility adjacent to, and within the metropolitan area of, the city of Cheyenne, Wyoming. Tracy also requests that the Commission upgrade KOZY-FM from Channel 239C3 to Channel 226C1 at its existing location. In order to implement these changes, Tracy proposes a number of other changes to the FM Table of Allotments, including the change of KQRQ's channel from 222C1 to 258C1.

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New Generation opposes the proposed change in KQRQ's channel because it is completely unnecessary. As demonstrated below, Tracy can achieve its objectives of relocating KMOR and upgrading KOZY-FM without affecting the original proposal in the *NPRM* to upgrade KRKI(FM), Channel 258A, Newcastle, Wyoming, to Channel 258C0 and without imposing the considerable burden on New Generation of having to change KQRQ's channel. This outcome is in the public interest because it would constitute a win-win-win situation for every affected licensee. Moreover, New Generation opposes any change in KQRQ's channel because Tracy has not met its burden of showing that such change is in the public interest, particularly in light of the fact that the change will cause considerable disruption to KQRQ and impose large costs on New Generation simply to permit an additional signal to move into Cheyenne, an already well-served community and radio market. However, in the event that the Commission does require KQRQ to change channels as Tracy proposes, New Generation requests that the Commission order Tracy to come to an agreement with it on the reasonable expenses of the move as set forth below and to provide payment for those expenses in advance.<sup>1/</sup>

### **DISCUSSION**

#### **I. TRACY HAS NOT SHOWN THAT THE PUBLIC INTEREST REQUIRES THAT KQRQ'S OPERATIONS BE DISRUPTED AND THAT IT LOSE LISTENERS**

In order for the Commission to proceed with Tracy's multi-faceted proposal, Tracy has the fundamental obligation to demonstrate that there is no way for it to achieve its objectives without disrupting, at substantial cost and risk of losing listeners, KQRQ's operations, and that,

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<sup>1/</sup> New Generation notes that the Commission has not yet issued an Order to Show Cause directed to it as required by Section 316(a) of the Communications Act of 1934, as amended and Section 1.87 of the Commission's rules. Though New Generation has become aware of the instant Counterproposal and is filing this Objection, it intends to more fully respond to the Counterproposal upon receipt of that Order, if any.

if there is no alternative, the public interest still requires that result. Tracy has not met and cannot meet its dual burden of proof since the KQRQ channel change is completely unnecessary. As demonstrated in the attached Technical Statement, Tracy's goals can be achieved with one small change to its Counterproposal. *See Exhibit A hereto.* That is, instead of the proposed substitution of Channel 259A for the existing vacant allotment of Channel 224A at Wright, Wyoming, Channel 253A can be substituted at Wright. Unlike Tracy's proposal, this substitution does not conflict with the proposed allotment of Channel 258C0 at Newcastle nor does it prevent Tracy from upgrading KOZY-FM or relocating KMOR to Warren AFB as it has proposed. *See Exhibit A.* Moreover, this alternate substitution at Wright does not impose unwarranted costs on New Generation. Accordingly, it best serves the public interest.

**II. THE PUBLIC INTEREST IS NOT SERVED BY DISRUPTING KQRQ's OPERATIONS AND CAUSING THE STATION TO LOSE LISTENERS SIMPLY SO THAT TRACY CAN MOVE ANOTHER FM SIGNAL INTO CHEYENNE**

Moreover, the public interest is disserved by burdening KQRQ just so that Tracy can move into the community of Cheyenne. There should be no genuine question that the proposed channel change will disrupt KQRQ's operations and confuse the station's listeners. New Generation has invested a great deal of time, money, and effort not only in instituting service from KQRQ, but also in promoting the station and building listener familiarity and loyalty in the two years since the station's inception. Some of this goodwill simply cannot be recouped, and will be forever lost, should New Generation be forced to make the drastic channel change proposed by Tracy. Tracy's interest in relocating its Nebraska station to Wyoming, to provide yet another signal for Cheyenne, which is already well served, has not been shown to necessarily require KQRQ to change channels, and it has not been shown to outweigh the severe disruption that will be imposed on KQRQ.

**A. Warren AFB Is Not A “Community” For Purposes Of The Table Of FM Allotments**

Warren AFB is the equivalent of a residential college or university campus. Similar to such campuses, Warren AFB has places to reside, shop, eat, and do laundry. Also like a university campus, Warren AFB is governed by a person who is not publicly elected. Moreover, like the families who are employed by such colleges and universities, Warren AFB families send their children to local public schools. Is Georgetown University a “community” for purposes of the Commission’s Table of FM Allotments? Because of the indistinguishable nature of Warren AFB from any residential college or university campus, Warren AFB is simply not a “community” for purposes of the Commission’s Table of FM Allotments.

**B. Even If Warren AFB Were Considered a “Community” For Purposes Of The Table of FM Allotments, It Is Part Of The Cheyenne Urbanized Area And Therefore Does Not Warrant A First Local Service Preference**

Even if Warren AFB were deemed to constitute a “community,” for purposes of the Commission’s Table of FM Allotments, it is located within and is an integral part of the Cheyenne Urbanized Area. Where, as here, a petitioner is seeking to change the community of license of one of its radio stations and claims that it will provide a first local service to a community within an Urbanized Area, the Commission must evaluate the proposed community of license under the so-called *Huntington* and *Tuck* criteria to determine whether the community should be credited with the services from the entire Urbanized Area, or whether it should be given a local service preference. See *Huntington Broadcasting Co. v. FCC*, 192 F.2d 33 (D.C. Cir. 1951); *Faye & Richard Tuck*, 3 FCC Rcd 5374 (1988). Pursuant to those criteria, the Commission examines (a) signal population coverage; that is, the degree to which the proposed station could provide service not only to the suburban community, but also to the adjacent

metropolis; (b) the size and proximity of the suburban community relative to the adjacent city and whether the suburban community is within the Urbanized Area of the city; and (c) the interdependence of the suburban community with the central city. *See Tuck*, 3 FCC Rcd 3574 at ¶¶ 26, 28.<sup>2/</sup>

In this case, application of those criteria demonstrates that Warren AFB is an integral part of Cheyenne and the Cheyenne Urbanized Area and therefore is not deserving of a first local service preference. First, from its specified reference site, KMOR(FM) will be able to place a city grade signal over 100% of the Cheyenne Urbanized Area. Second, the eastern boundary of Warren AFB is contiguous with the city of Cheyenne, the central city of the Cheyenne Urbanized Area, and Warren AFB's population is only 8.4% of the total population of the city. Finally, as mentioned above, although Warren AFB does have certain community-like attributes, those characteristics are really no different from the characteristics of a residential college or university campus. For example, the Base has no elected officials, no transportation system, and only a handful of minor commercial establishments. Children of military families stationed there attend Laramie County (where Cheyenne is located) schools, and both Warren AFB and Cheyenne are located in the same advertising market. Moreover, the Wyoming Tribune Eagle, the local daily

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<sup>2/</sup> *Tuck* sets forth the following criteria to be considered in determining whether a community for which a Section 307(b) preference is sought is truly independent of a larger, nearby community: the extent to which community residents work in the larger metropolitan area, rather than the specified community; whether the smaller community has its own newspaper or other media that covers the community's local needs and interests; whether community leaders and residents perceive the specified community as being an integral part of, or separate from, the larger metropolitan area; whether the specified community has its own local government and elected officials; whether the smaller community has its own telephone book provided by the local telephone company or zip code; whether the community has its own commercial establishments, health facilities and transportation systems; the extent to which the specified community and the central city are part of the same advertising market; and the extent to which the specified community relies on the larger metropolitan area for various municipal services such as police, fire protection, schools and libraries.

newspaper published in Cheyenne, is delivered daily to the Base. Though Warren AFB has a weekly newspaper of its own covering happenings on Base, that newspaper is comparable to a neighborhood or college or business campus newsletter. It does not cover international or even local Cheyenne news or financial or sports news. For those topics, residents of the Base look to the Cheyenne daily newspaper as well as to area radio and television stations. In addition, though the Base has a unique zip code (82005), that zip code is essentially used for military-related buildings such as the personnel and administrative offices. The unspecialized, civilian-like areas of the base, including the single-family housing, all use a Cheyenne zip code (82001). Accordingly, Warren AFB is interdependent with Cheyenne and the larger Urbanized Area.

There is no genuine dispute that the Cheyenne Urbanized Area is well served. There are eight AM and FM radio stations licensed to Cheyenne alone as well as several pending applications for full power radio stations to serve that community.<sup>3/</sup> Moreover, the Cheyenne Urbanized Area is served by at least 15 full power radio stations. By contrast, Tracy will remove the sole competitive commercial FM service from Scottsbluff, leaving only a commercial AM/FM station combination owned by Panhandle Broadcasting, Inc. and a single commercial AM station owned by Tracy. Accordingly, Tracy has not shown, and cannot show, that the addition of one more FM station at Cheyenne, clearly outweighs the loss of that station from Scottsbluff, Nebraska and the disruptive and damaging effect of such change on KQRQ.

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<sup>3/</sup> See FCC File Nos. BNP-20040130AVW, BNP-20040130BHW, BNP-20000201AEM, and BPED-19970507MA.

**III. IN THE EVENT THAT ITS COUNTERPROPOSAL IS APPROVED WITHOUT ALTERATION AND KQRQ IS FORCED TO CHANGE CHANNELS, TRACY MUST PAY NEW GENERATION ITS REASONABLE EXPENSES OF THE CHANNEL CHANGE**

Nevertheless, in the event that the Commission were to adopt Tracy's proposal, including the KQRQ channel change, New Generation requests that the Commission concurrently order Tracy to come to an agreement with it on the reasonable expenses of the KQRQ channel change and to provide payment for those expenses in advance. As demonstrated below, the financial costs to be incurred in connection with the proposed channel change, not to mention the intangible but real costs resulting from the loss of listenership, will be substantial. For example, because the change in channels is so drastic, New Generation could possibly be unable to retune its current antenna and, thus, would be required to purchase a new one. A new antenna would necessitate the purchase of a new transmitter. Based on actual price quotes provided by broadcast equipment manufacturers and technicians as well as estimates by its own staff, New Generation estimates that, with a new antenna and transmitter, the proposed KQRQ channel change would cost more than \$200,000.

As the Commission is well aware, negotiations over reimbursement can be contentious and prolonged, and the outcome is often uncertain. *See, e.g., Circleville, Ohio*, 8 FCC 2d 159 (1967). New Generation simply should not be required to expend such substantial sums without adequate assurance of advance payment by Tracy. As the Commission has acknowledged, no station need take steps to change frequency until it is assured that it will receive full payment. *Smith and Reno, Nevada*, 12 FCC Rcd 10218 (1997) (citing *Churchville and Luray, Virginia*, 5 FCC Rcd 1106 (1990), *recon. denied*, 6 FCC Rcd 1313 (1991)). In this case, there is no doubt that Tracy will be the ultimate beneficiary of a KQRQ channel change; thus, there is no

unfairness in imposing upon Tracy a prepayment requirement in this proceeding. New Generation should not be placed in the situation of having to “finance” Tracy’s business plan, even for a day.

New Generation’s estimated costs are set forth below:

(1) *Engineering, legal, and equipment.* – \$152,237.50. This includes the cost of a new antenna and installation of the antenna by one foreman and three technicians working 10 full days as well as the cost of a new transmitter and field service work on the transmitter. The figure does not include any legal fees, the cost of travel for the technicians who install the antenna, or costs incurred due to weather delays, though New Generation would also be entitled to payment for such costs.

(2) *Printing.* – \$1,000. This includes the cost of printing new stationary and business cards.

(3) *Out-of-pocket nonreducible expenses while station is off the air.* – \$12,000. This includes the costs incurred for salaries of station employees and lost sales commissions for two weeks.

(4) *Advertising for new frequency and promotional items.* – \$52,500. This includes the cost of advertising the frequency change in the local newspaper, on television, and on billboards, the costs of a redesign of the station’s logo, new voice work on the station, and new T-shirts.

(5) *Miscellaneous.* – \$32,000. This includes lost revenue from KQRQ having to go off the air for an extended period as well as additional costs of 4% South Dakota state sales tax and 2% Rapid City sales tax imposed on all equipment and payments to service providers for work on the KQRQ tower, which is located in Rapid City.

New Generation reserves the right to augment these line items and estimates as more facts become known. The licensee simply should not be required to expend such a large sum without payment in advance.

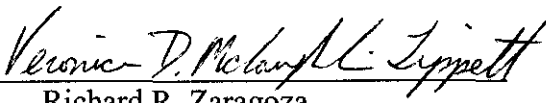


**CONCLUSION**

For these reasons, New Generation requests that the Commission alter Tracy's reallocation Counterproposal as specified herein or deny the proposal. In the event that the Counterproposal is accepted, however, New Generation requests that the Commission order Tracy to come to an agreement with New Generation on the reasonable expenses of the KQRQ channel change and to provide payment for those expenses in advance.

Respectfully submitted,

New Generation Broadcasting, LLC

By:   
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Its Attorneys

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Dated: March 26, 2004

## **EXHIBIT A**

TECHNICAL STATEMENT  
IN SUPPORT OF  
OPPOSITION TO COUNTERPROPOSAL OF  
TRACY BROADCASTING CORPORATION  
PREPARED FOR  
NEW GENERATION BROADCAST, LLC  
RAPID CITY, SOUTH DAKOTA

This Technical Statement was prepared on behalf of New Generation Broadcasting, LLC (herein "New Generation"), licensee of FM station KQRQ(FM), in support of an Opposition to Counterproposal of Tracy Broadcasting Corporation (herein "Tracy"), which was filed in response to a *Notice of Proposed Rule Making* in MB Docket No. 03-258 (herein "*NPRM*"). KQRQ(FM) is licensed to Rapid City, South Dakota, on Channel 222C1.

In the *NPRM*, the Commission proposed the substitution of Channel 258C0 for Channel 258A at Newcastle, Wyoming. To accommodate the Channel 258C0 proposal, the Commission proposed that Channel 260A would be substituted for the vacant allotment of Channel 259A at Pine Haven, Wyoming.

Tracy has put forward a multi-step counterproposal to the original *NPRM* proposal involving nine additional channel changes, including a requirement that the licensed KQRQ(FM) facility change its channel from 222C1 to 258C1. However, Tracy fails to state that its entire proposal can be accomplished *without any disturbance of the* Newcastle proposal and without any disturbance of KQRQ(FM)'s licensed operation on Channel 222C1.

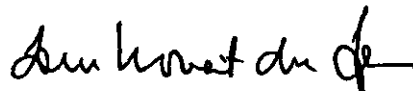
Specifically, Tracy proposes that Channel 259A be substituted for Channel 224A at Wright, Wyoming. This conflicts with the *NPRM* proposed substitution of Channel 258C0 at Newcastle. Tracy thus proposes the substitution of Channel 222C0 for Channel 258C0 at Newcastle, which requires the migration of KQRQ(FM) to Channel 258C1. However, our study reveals that Channel 253A can be substituted for Channel 224A at Wright, which would entirely eliminate the conflict with

Channel 258C0; and, thus, with KQRQ(FM) on Channel 222C1 in Rapid City. The attached Figure 1 is an allocation study for Channel 253A at Wright, Wyoming.

Indeed, we have verified that the entire Tracy proposal can be accomplished without the need to disturb the Channel 258C0 proposal at Newcastle and Channel 222C1 at Rapid City. The following channel changes from the Tracy Counterproposal have been verified to meet the separation requirements of Section 73.207 of the FCC Rules without any change to the Newcastle proposal or KQRQ(FM) at Rapid City:

- Channel 226C1 at Gering, NE
- Channel 225C2 at Warren AFB, WY
- Channel 228A at Centennial, WY
- Channel 222C1 at Casper, WY
- Channel 253A at Wright, WY
- Channel 224C1 at Douglas, WY
- Channel 247C1 at Kaycee, WY

Therefore, it is concluded that the Tracy proposal can be fully accomplished without the need to disturb the Channel 258C0 proposal at Tracy and the licensed operation of KQRQ(FM) on Channel 222C1 at Rapid City.



Louis Robert du Treil, Jr., P.E.

du Treil, Lundin & Rackley, Inc.  
201 Fletcher Ave.  
Sarasota, Florida 34237

March 26, 2004

Figure 1

TECHNICAL STATEMENT  
IN SUPPORT OF  
OPPOSITION TO COUNTERPROPOSAL OF  
TRACY BROADCASTING CORPORATION  
PREPARED FOR  
NEW GENERATION BROADCAST, LLC  
RAPID CITY, SOUTH DAKOTA

Allocation Study for Channel 253A at Wright, Wyoming

Job Title:  
Channel: 253 A

Separation Buffer: 50 km  
Coordinates: 43-44-49 105-28-12\*

Call Id	City St	File Status	File Num	Channel Freq	ERP HAAT	DA Id	Latitude Longitude	73 215	Bear	Dist. (km)	Req. 215	(km) 207
971007 88675	GLENROCK WY	APP C	BPH 19971007MB	252 A 98.3	6.000 100	N	42-53-49 105-52-03	N	198.9	99.79 27.79	49.0 Clear	72.0
971009 88722	GLENROCK WY	APP C	BPH 19971009MH	252 A 98.3	6.000 95	N	42-53-28 105-52-04	N	198.8	100.41 28.41	49.0 Clear	72.0
971010 88725	GLENROCK WY	APP C	BPH 19971010MG	252 A 98.3	0.200 -76	N	42-51-49 105-52-15	N	198.4	103.38 31.38	49.0 Clear	72.0
971007 88675	GLENROCK WY	VAC C		252 A 98.3	0.000	N	42-51-30 105-52-24	N	198.4	104.01 32.01	49.0 Clear	72.0
KZZS 89085	STORY WY	LIC C	BLH 20030228AAI	252 C1 98.3	100.000 83	N	44-34-32 106-52-23	N	309.9	145.17 12.17	111.0 Close	133.0
KOUT 14642	RAPID CITY SD	LIC C	BLH 19990625KF	254 C1 98.7	100.000 141	30371	44-04-13 103-15-01	N	77.8	181.90 48.90	111.0 Clear	133.0

\* Reference coordinates for center of Wright.

**CERTIFICATE OF SERVICE**

I, Julia Colish, do hereby certify that I have this 26<sup>th</sup> day of March, 2004, mailed by first-class United States mail, postage prepaid, copies of the foregoing "OPPOSITION TO COUNTERPROPOSAL OF TRACY BROADCASTING CORPORATION" to the following:

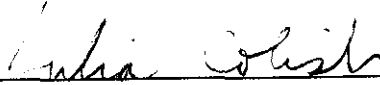
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\_\_\_\_\_  
Julia Colish

\*Via Hand Delivery